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Office of the United States Political
Adviser for Japan,
Tokyo.

MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Morio YUKAWA, Director of the Economic Affairs Bureau
Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Masao OSATO, Chief, Fourth Section, Treaties Bureau
Mr. Takeshi KANEMATSU, Secretary, First Section, Economic Affairs Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs Bureau

For the Office of the United States Political Adviser, Japan:

Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the United States Political Adviser, Tokyo, Japan.

Date: Wednesday, February 27, 1952. SECOND INFORMAL MEETING

Mr. Adams stated that he had been asked to express Ambassador Sebald's and Mr. Waring's concern regarding the misunderstanding arising from newspaper reports on the present informal discussions, which have been identified erroneously by the press as "formal negotiations". Mr. Adams submitted for Mr. Yukawa's consideration a draft press release intended to clarify the informal and technical-level status of the present discussions.

Mr. Yukawa read the draft release and then stated that there was no objection to its issuance as a joint press release. It was agreed that the statement quoted below, would be released jointly at 6:00 p.m., Wednesday, February 27, 1952.

"The Ministry of Foreign Affairs of the Japanese Government and the Office of the United States Political Adviser in Tokyo said today that there appears to be some misunderstanding in the press concerning the purpose of the informal discussions which are now being carried out in connection with the eventual negotiation of a Treaty of Friendship, Commerce and Navigation between Japan and the United States. The Ministry of Foreign Affairs and the Office of the United States Political Adviser emphasized that the present informal discussions are limited solely to an exchange of views on the technical level, with the limited objective of ascertaining areas of agreement between the two Governments wherever possible, and further, of determining those points regarding which differences of views may exist.

"It was further said that upon the conclusion of the present preliminary technical discussions it was expected that a conference will be convened to negotiate a mutually satisfactory treaty for submission to and eventual ratification by the two Governments in accordance with their respective constitutional processes."

Mr. Yukawa stated that he wanted to emphasize the fact that when the Japanese representatives prepared their position on the standard draft provisions, there were a number of points on which they had encountered difficulties in adjusting the various opinions of the Ministries concerned. The Japanese side therefore was not in a position to give a definite answer to any changes to their proposals concerning the standard draft without further reference to the Ministries. Mr. Yukawa further stated that it would sometimes be necessary to obtain the specific approval of the Minister of Foreign Affairs and that a decision could in some cases be made only after the whole picture of the FCN Treaty is made clear. He suggested that when such points in question are encountered, they be set aside for future discussion during the present informal conversations. Mr. Yukawa suggested that after all the articles in the standard draft have been discussed a clear picture would emerge as to the points on which agreement had been reached as well as on those where differences of opinions remained. Mr. Yukawa added that he would then be in a position again to consult with the various Ministries concerned, and that agreement on some of the points originally set aside might then be possible during the latter stages of the present informal discussions.

Mr. Adams thanked Mr. Yukawa for his statement and added that this view was shared by the American side, as evidenced by Mr. Waring's remarks on February 25 regarding the ad referendum status of the present meetings. Mr. Adams then proposed that the discussion on Article II be resumed.

ARTICLE II

Mr. Yukawa pointed out that Article II extends entry rights to persons "carrying on trade between the territories of the two parties and engaging in related commercial activities". He added that it was not clear what types of business activities may be covered by the phrase "related commercial activities".

Mr. Singer replied that the phrase "engaging in related commercial activities" as used in Article II is a statement regarding one of the purposes of entry and sojourn covered by this Article, and is not intended to define the types of commercial activities which are properly covered by, and subject to, the provisions of Article VII and VIII. He stated that individuals engaging in the activities covered by Articles VII, paragraph 1, and VIII, paragraph 1, are entitled to enter the territories of the other party under the provisions of Article II, paragraph 1 a.

Mr. Yukawa stated that Mr. Singer's explanation of this phrase was clear and that the use of the phrase in question in Article II was now understood and accepted by the Japanese side.

Mr. Yukawa then stated, that, in view of the principles set forth in the Preamble of the standard draft, most-favored-nation treatment should be accorded with respect to the basic personal rights mentioned in paragraph 2, Article II. He added that this paragraph provides that basic personal rights are subject to measures necessary to maintain public order and to protect the public health, morals and safety, but that there is no guarantee against discriminatory treatment as compared with the nationals of any third country.

Mr. Bassin, in reply, referred to a previous statement by Mr. Singer at the February 25 meeting regarding the Department of State's opinion that the most-favored-nation standard adds nothing to a provision dealing with elementary human rights, and might serve only to weaken it. Mr. Bassin added that, under paragraph 2, certain basic human freedoms are granted without restrictions, and that it was superfluous therefore to qualify these freedoms by making them subject to most-favored-nation treatment.

Mr. Yukawa stated that the explanation given regarding this point was satisfactory and he agreed that paragraph 2 was adequate in its present form.

Mr. Adams then asked whether there were any further questions on Article II. Receiving a negative reply from Mr. Yukawa and Mr. Otabe, Mr. Adams then stated that it appeared that only the point raised at the February 25 meeting (i.e. the Japanese suggestion that a most-favored-nation treatment clause be inserted in Article II, paragraph 1, with reference to "for other purposes subject to the laws relating to the entry and sojourn of aliens") remain pending.

Mr. Yukawa replied that this was correct, and he proposed that discussions continue with Article III.

ARTICLE III

Mr. Yukawa stated that the word "molestations" in paragraph 1, Article III, was not clear to the Japanese side and suggested that the adjective "unlawful" be inserted, since the phrase "unlawful molestations" was more readily understandable to the Japanese representatives.

Mr. Adams replied that there appeared to be no objection to the acceptance of the word "unlawful" for the purposes of these informal discussions.

Mr. Otabe then raised the question as to whether the word "molestations" referred to undue molestations on the part of policemen or other competent officials or whether it referred to all manner of molestations at the hands of private individuals. He added that acts of the latter kind could not always be prevented by the Government despite the safeguard of normal protection by the police.

Mr. Adams replied that "molestations" as mentioned in this Article refers to molestations by Government officials, as well as those resulting from concerted actions by a group of private citizens which may have the support of the Government, or of which the Government is aware and can prevent. "Molestations" by private persons, except as mentioned above, are not covered by this Article, since, for example, a person unduly molested by a neighbor has access to the courts for relief.

Mr. Yukawa replied that he appreciated the clarification given regarding the term "molestations", and added that the Japanese side reserved its position pending further consideration of this point with reference to the concept of international law, which he proposed to discuss next.

Mr. Yukawa then stated that it was recognized that all persons should receive the most constant protection and security. He added that the standard draft declares that this constant protection and security should be "in no case less than that required by international law", thus leaving the standard for protection and security to the

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rules of international law. However, Mr. Yukawa added, the standard of treatment in the FCN Treaty should be stated as clearly as possible, and, moreover, there appeared to be no justifiable reason for setting up for aliens a standard (i.e. "international law") different from that established for one's own nationals. Mr. Yukawa suggested that this phrase be amended to read "shall receive the most constant protection and security, in no case less than that accorded, in like circumstances and conditions, to nationals of such other party".

Mr. Bassin replied that reference to the international law standard is usual in treaties entered into by the United States. He added that the basic standard for diplomatic protection of citizens abroad is international law, rather than local law.

Mr. Yukawa questioned whether treatment more favorable than national treatment could be guaranteed aliens under Japan's constitution in connection with protection and security, and expressed the opinion that the concept of international law might imply that such favorable treatment be required to be extended to aliens.

Mr. Bassin stated that Japan's Constitution is regarded as an equitable and enlightened instrument, and that it was not intended that Japan be required to take any action inconsistent with its Constitution with respect to the protection and security extended to aliens. Mr. Bassin expressed the view that Japan's Constitution does not, however, prevent the extension of protection and security to aliens in accord with accepted international law concepts. Mr. Bassin added that it is established diplomatic practice for both Japan and the United States to seek - as do other countries - the protection of their citizens abroad in accordance with concepts of international law.

Mr. Yukawa emphasized that the Japanese legislations and the judiciary system, modeled after those of the United States, are quite complete and progressive. Therefore, with respect to the relations between the United States and Japan, the standard of national treatment should be satisfactory to both parties.

Mr. Yukawa then stated that the phrase in paragraph 2, "is taken into custody" should be amended to read "is accused of crime and taken into custody", because the subsequent clauses should apply only when a person is detained on suspicion of crime and under a warrant of arrest.

Mr. Bassin replied that the additional phrase, "accused of crime", although previously used in some United States treaties, was now regarded as limiting unjustifiably the protection sought in paragraph 2. He added that the phrase "accused of crime" is therefore no longer contained in the Department of State's standard draft on the FCN Treaty.

Mr. Yukawa stated that persons might be taken into administrative or protective custody, such as drunken sailors who might be detained overnight in order to protect their lives or property. Mr. Otabe stated that it was in connection with such protective custody cases as those involving overnight detention that the Japanese side questioned the need for advising the appropriate consular official. Mr. Yukawa said that this also raised a question regarding the obligation that the consular officer "be immediately notified" as provided in paragraph 2. Mr. Yukawa added that it would be impossible in some cases to make immediate notification since the request might be made to the arresting police officer at a very late hour. He inquired, therefore, as to the meaning of the phrase "be immediately notified".

Mr. Adams replied that in certain cases notification to the appropriate consular officers might be delayed for several hours or until the next morning after the detained person's request. He added that the phrase "be immediately notified" was understood to mean appropriate notification at the earliest possible and practicable moment.

Mr. Otabe then requested a definition of the word "accusations" as contained in paragraph 2 (b) of Article III. Mr. Bassin replied that this word means a charge for violation of law, but does not necessarily imply a formal indictment. Mr. Bassin added that a person might be taken into custody without being accused of a crime, for example, as a material witness or awaiting deportation proceedings. He further stated that it was reasonable for a person so detained to want to notify his consular representative, and that the present phrase in paragraph 2, "taken into custody", would permit such notification, whereas the additional phrase suggested by the Japanese, "is accused of crime", would unnecessarily restrict a person's right in this regard.

In reply to inquiry by Mr. Yukawa, Mr. Bassin stated that the provisions of 2 (a) of Article III applied to both administrative and criminal cases, and that the provisions of 2 (b) and (c) applied only to criminal cases. With respect to paragraph 2 (d), Mr. Bassin stated that it applied to criminal cases, but that the principle would be extended to cover non-criminal cases where a person is in the custody and entitled to proper counsel, as for example, in deportation proceedings.

Mr. Yukawa then stated that all points raised by his associates and himself with reference to paragraph 2 were now clear and acceptable to the Japanese side, with the exception of the point involving his suggestion that the phrase "is accused of crime and" be inserted before "taken into custody". Mr. Yukawa added that this change would be consistent with the phraseology employed in some of the FCN Treaties which the United States has concluded with other countries.

Mr. Adams then inquired whether the point just mentioned by Mr. Yukawa and the Japanese reservation with respect to the phrase "international law" in paragraph 1 were the only pending questions regarding Article III. Mr. Yukawa replied in the affirmative, stating that both these points would receive further study on the Japanese side for subsequent discussion; and he proposed that the meeting continue with the next Article.

ARTICLE IV

Mr. Yukawa stated that he understood that relief systems, such as public assistance for helpless persons, children's welfare, and similar public assistance programs which are paid out of the appropriations of the central or local governments, are not included within the meaning of the "compulsory systems of social security" as used in paragraph 2 of the present Article.

Mr. Bassin stated that Mr. Yukawa's understanding in this regard was correct. He added that the wording employed, "compulsory system of social security", reflects the characteristics of the United States system intended to be covered by the FCN Treaty, and ensures that there is no misunderstanding as to the types of benefits which are not covered by the Treaty, such as State relief and public assistance programs. The compulsory system of social security requires the participation of its beneficiaries, who contribute to its financing through payroll deductions fixed by law, and it falls in the category of an "insurance", as opposed to a "charity", system.

Mr. Otabe requested an interpretation of the phrase "arising out of and in the course of employment" as used in paragraph 1.

Mr. Adams replied that - for the sake of mutual understanding in these informal discussions - this phrase might be regarded as meaning "resulting from a person's work during employment", although the phraseology of paragraph 1 is broader and more flexible. Mr. Bassin added that the phrases employed in paragraph 1 were adopted by the Department of State on the advice of a leading expert in the field of workmen's compensation, which is principally or exclusively under the jurisdiction of the various States in the United States. The phraseology of paragraph 1 is designed to grant treaty right to the maximum range of workmen's compensation covered by the various State laws in the United States.

Mr. Bassin added that the words "disease" and "due to the nature of employment" are examples which reflect advanced legislation of certain States correcting inadequacies of earlier laws. Tuberculosis, for example, had not previously been a compensable disability because - although a consequence of the work engaged in by the victim - it was not a "bodily injury" and was not technically speaking contracted "in the course of employment". Mr. Singer stated that the phraseology

employed in the standard draft assists the authorities of the various States in the United States to understand more readily what their obligations are under an FCN Treaty.

Mr. Otabe then stated that the Japanese National Health Insurance system is not compulsory, and that it is not generally open to participation by aliens. He inquired whether such a system was regarded as coming within the scope of Article IV.

Mr. Singer replied that a health insurance system of this type would not be regarded as falling under Article IV. Mr. Adams stated that it was his understanding that the workmen's compensation and social security systems of Japan and the United States were similar, although there are doubtlessly many technical points of difference. Mr. Adams added that Article IV is not intended to define the various types of legislation covering these systems in either country, but rather to assure the extension of national treatment to the nationals of the other Party.

Mr. Yukawa then stated that the definitions and explanation given him were satisfactory, resolving the various questions raised by the Japanese representatives. Mr. Yukawa added that the provisions of Article IV had been made clear to the Japanese side, and that this Article was acceptable without change.

Mr. Singer suggested adjournment, and it was agreed that the next meeting would be on Friday, February 29th, at 2:00 p.m., with discussions to begin on Article V of the standard draft.

/S/ M. YUKAWA

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